UMW TOYOTA MOTOR SDN BHD & ANOR v. ALLAN CHONG TECK KHIN & ANOR

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
ABU BAKAR JAIS JCA
SUPANG LIAN JCA
[CIVIL APPEAL NO: P-02(NCVC)(W)-1824-10-2019]
16 FEBRUARY 2021

DAMAGES: *Action for – Breach of duty – Defect in vehicle purchased – Purchaser sought general and aggravated damages from dealer and distributor of vehicle – Whether vehicle suffered from abnormal and excessive vibrations – Whether defect could be rectified – Whether there were false and inaccurate representations by dealer/distributor which had induced purchaser to purchase vehicle – Whether breach of duty established*

EVIDENCE: *Witness – Expert witness – Expert evidence – Vehicle purchased allegedly suffered from excessive and abnormal vibrations – Purchaser sought general and aggravated damages from dealer and distributor of vehicle – Purchaser adduced expert witnesses while dealer and distributor did not – Whether expert witness' evidence could only be challenged and rebutted by evidence of another expert – Whether in absence of expert evidence from dealer and distributor, evidence of purchaser's experts was acceptable*

The second appellant ('second defendant') was the main distributor of Lexus brand vehicles in Malaysia while the first appellant ('first defendant') was a car dealer. The respondents ('plaintiffs'), having seen advertisements and numerous posts on the Lexus NX200T model ('vehicle') on the second defendant's Facebook page, became interested in the vehicle and decided to go for a test drive at the first defendant's premises. Satisfied with the test drive and influenced and encouraged by the assurances, representations and advertisements of the appellants ('defendants'), the plaintiffs were led to believe that the vehicle would guarantee a smooth and comfortable drive. The plaintiffs then placed a booking fee and, later, made the necessary financial arrangements with the bank to purchase the vehicle. From the time of delivery of the vehicle, excessive and abnormal vibrations ('problems') from the floorboards were felt when driving the vehicle. Three days after the delivery, the plaintiffs contacted the first defendant to complain about the problems. The plaintiffs sent the vehicle to the first defendant's service centre for evaluation. It was taken back to await results of the evaluation. In the meantime, the problems persisted. The vehicle was sent back to the first defendant for a second inspection but the first defendant was still unable to resolve the problems. After highlighting the matter to the Lexus Headquarters, the plaintiffs received a letter from the second defendant

containing a table of the results of vibration tests carried out by the latter's technical team, claiming that there was nothing wrong with the vehicle. Despite repeated requests, the plaintiffs were unable to get the detailed results of the tests carried out by the second defendant. The plaintiffs commenced an action against the defendants, at the High Court, seeking general and aggravated damages, interests and costs. The plaintiffs argued that the defendants had breached their duty to make accurate and true representations, that the vehicle provided smooth, comfortable and luxurious ride to both driver and passengers, resulting in loss, pain and discomfort. During trial, the plaintiffs adduced the evidence of experts in the field of vibrations, namely Dr Ahmad Zhafran ('SP1') and Dr Muhammad Najib ('SP2'). The tests carried out by SP1 on the vehicle showed that the vibrations in the vehicle were higher than the readings produced by the second defendant. The comparison of vibration tests carried out by SP2 and his team confirmed that the vehicle had excessive vibrations that would affect the comfort of the driver and the front passenger. The defendants, on the other hand, did not call any expert to give evidence but, instead, cross-examined SP1 and SP2. Under cross-examination, SP1 and SP2 confirmed that the results of their tests showed that the vibration levels detected on the vehicle to be within comfortable range and the vehicle had shown better readings and results compared to the comparison vehicles. The High Court Judge ('HCJ') was of the opinion that: (i) an expert witness' evidence could only be challenged and rebutted by the evidence of another expert; and (ii) in the absence of expert evidence from the defendants, the evidence of plaintiffs' experts were accepted. At the conclusion of the trial, the HCJ held the defendants liable following the findings that: (i) the vehicle suffered from abnormal and excessive vibrations and it had a defect which could not be rectified; (ii) the defendants had made false and inaccurate representations to the plaintiffs that the vehicle provided a smooth, comfortable and luxurious ride; (iii) the plaintiffs were induced by those false and inaccurate representations to purchase the vehicle; (iv) the defendants had breached their statutory duty not to make false and confusing representations; and (v) the plaintiffs had suffered discomfort and losses. The HCJ awarded the plaintiffs general damages of RM100,000 and costs of RM30,000. Hence, the present appeal by the defendants. The issues that arose for determination were (i) whether the vehicle suffered from abnormal and excessive vibrations and that it had a defect that could not be rectified; (ii) whether the HCJ erred in her finding that there were false and inaccurate representations by the defendants which had induced the plaintiffs to purchase the vehicle; (iii) whether the HCJ erred and misdirected herself in law in deciding that the evidence of an expert could only be challenged and rebutted by the evidence of another expert; and (iv) whether the HCJ erred in allowing the claim by the second plaintiff when she never attended the trial and did not lead evidence whatsoever.

Held (allowing appeal; setting aside decision of High Court)
Per Supang Lian JCA delivering the judgment of the court:

(1) The findings by the HCJ, that based on SP1 and SP2's reports and evidence in court, the vehicle suffered from the problems and had a defect which could not be rectified, were clearly erroneous. These findings were against the weight of the evidence of SP1 and SP2 and were not supported by their reports and oral testimonies. To the contrary, the defendants had established beyond reasonable doubt, through the oral and documentary evidence of SP1 and SP2, that there was no excessive vibrations in the vehicle. Moreover, even based on the ISO standard, the vibration levels in the vehicle fell within the comfortable range. The HCJ had not taken proper advantage of her having seen and heard the witnesses. Consequently, the plaintiffs failed to prove that there were abnormal and excessive vibrations felt inside the vehicle when driven. There was no question of the defendants having breached their duty to make accurate and true representation, that the vehicle provided a smooth, comfortable and luxurious ride, resulting in loss, pain and discomfort to the plaintiffs. (paras 53-55)

(2) The HCJ had adopted an over-simplified approach and held (i) that an expert witness' evidence could only be challenged and rebutted by the evidence of another expert; and (ii) in the absence of expert evidence from the defendants, the evidence of plaintiffs' experts were accepted. This finding was erroneous in law and amounted to a serious misdirection. Through the cross-examination of the plaintiffs' own expert witnesses, SP1 and SP2, the defendants had been able to get them to admit and confirm that (i) the vehicle did not suffer from the problems as the first plaintiff had alleged and that, in fact, the vibration levels in the vehicle were within the comfortable range; and (ii) the vehicle was not experiencing the problems. That being so, the question of the defendants having to call their own experts to challenge and rebut the evidence of SP1 and SP2 did not arise at all. Notwithstanding that there was no expert witness called by the defendants, the HCJ was duty-bound to consider the totality of the evidence of SP1 and SP2, including the oral evidence elicited from them under cross-examination. (paras 57, 61, 65, 66, 69 & 71)

(3) Since it was determined that the vehicle did not suffer from the problems and the vibrations were, in fact, within the comfortable range as confirmed by SP1 and SP2, there was no misrepresentation or breach of duty by the defendants, as alleged by the plaintiffs. (para 75)

(4) If the claim was genuine and the second plaintiff wanted to pursue it, it was incumbent upon her to come to court to give evidence. The first plaintiff could not testify for her by way of proxy or representation. The second plaintiff's absence from the trial not only resulted in there being no evidence in support of her case but, more importantly, the defendants had been deprived of their right to cross-examine her. By allowing the second plaintiff's claim, the HCJ had allowed her claim without her having to testify and lead evidence and without her having to be subjected to cross-examination. This was a serious and grave error of law of the part of the HCJ which had greatly prejudiced the defendants who had been found liable to a party who did not even bother to appear in court to prove her case. (paras 107 & 108)

Case(s) referred to:
Jaya Asahak v. Munggau Lawai & Ors (No 2) [2010] 1 LNS 886 HC ***(refd)***
Keruntum Sdn Bhd v. The Director Of Forests & Ors [2017] 4 CLJ 676 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Majuikan Sdn Bhd v. Barclays Bank Plc [2014] 9 CLJ 337 CA ***(refd)***
Mohamed Abdullah v. Chah Hea Seng [1980] 1 LNS 48 FC ***(refd)***
Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors And Another Appeal [2019] 1 LNS 26 CA ***(refd)***
Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong [2016] 9 CLJ 297 FC ***(refd)***
State of Rajasthan v. Hanuman AIR 2001 SC 282 ***(refd)***
Syed Abu Bakar Ahmad v. PP [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368 FC ***(refd)***
Yeohata Machineries Sdn Bhd & Anor v. Coil Master Sdn Bhd & Ors [2016] 2 CLJ 414 CA ***(refd)***

Legislation referred to:
Consumer Protection Act 1999, ss. 10, 18

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 31, paras 1079 to 1080

For the appellants/defendants - Jasmeetpal Singh; M/s Siew & Jasmeet
For the respondents/plaintiffs - Eric Augustin & Elson Beh; M/s YC Wong

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: PA-22NCVC-203-10-2017 (overruled).]

Reported by Najib Tamby

JUDGMENT

Supang Lian JCA:

Introduction

[1] On 6 September 2019, after a full trial, the High Court had allowed the claim of the respondents (the first and second plaintiffs in the court below) for general damages predicated on the appellants' (the first and second defendants in the court below) breach of duty to make accurate and true representations in respect of a vehicle which had induced the respondents to

purchase it from the appellants. The appeal before us is against that decision of the High Court. We heard the appeal on 15 September 2020 and allowed it. These are the reasons for our decision.

[2] For convenience, the parties will be referred to as they were in the High Court.

The Plaintiffs' (Respondents) Case

[3] The plaintiffs wanted to buy a SUV type vehicle when they came across the second defendant's Facebook page containing advertisements and numerous posts on the Lexus NX200T model. The second defendant is the main distributor of Lexus brand vehicles in Malaysia.

[4] As the plaintiffs were interested in the vehicle, a test drive was arranged with the sales representative of the first defendant, Ms Tracy Lim, who attended to the plaintiffs. From the test drive, the plaintiffs found the vehicle to provide a smooth and comfortable ride. They were assured that the vehicle would provide a similar driving experience.

[5] Influenced and encouraged by the assurances, representations and advertisements of the defendants, the plaintiffs were led to believe that the Lexus SUV model NX200T would guarantee a smooth and comfortable drive. They then on the spot, placed a booking fee of RM5,000 with the first defendant for a Lexus NX200T (A).

[6] On 31 March 2016, the plaintiffs paid a further sum of RM113,700 with the balance of the purchase price to be financed by Public Bank Bhd. The vehicle was registered on 8 April 2016 in the sole name of the second plaintiff. The hire-purchase loan with Public Bank was settled in January 2019 by the second plaintiff thereby making her the owner of the vehicle.

[7] From the time of delivery of the vehicle on 8 April 2016, excessive vibrations from the floorboards were felt when driving the vehicle. This resulted in the first plaintiff experiencing numbness and fatigue in his legs after driving it for 30 minutes. Just after three days from delivery, the plaintiffs contacted the first defendant to complain of the excessive and abnormal vibrations.

[8] The first plaintiff sent its general manager, Mr Wong Kok Choon and one Mr Yew Yeok Beng to attend to the plaintiffs and the issues with the vehicle. Consequently, the plaintiffs sent the vehicle to the first defendant's service centre for evaluation on 23 April 2016. It was then taken back to await the results of the evaluation.

[9] In the meantime, the problems with the excessive and abnormal vibrations with the vehicle persisted. The vehicle was sent back to the first defendant for a second inspection on 30 April 2016. However, the first defendant was still unable to resolve the problem of excessive vibrations in the vehicle.

[10] Thereafter, the plaintiffs brought the matter to the attention of the Lexus Headquarters in Kuala Lumpur. On 10 May 2016, the plaintiffs received a letter from the second defendant containing a table of the results of vibration tests carried out by the latter's technical team and claiming that there was nothing wrong with the vehicle. A

[11] Despite repeated requests, the plaintiffs were unable to get the detailed results of the tests carried out by the second defendant. They then sought out experts in the field of vibrations to ascertain whether the vehicle indeed have excessive vibrations. B

[12] The first expert that they consulted was Dr Ahmad Zhafran bin Ahmad Mazlan (SP1). He is a senior lecturer at Universiti Sains Malaysia (USM), specialising in the field of "Sound and Vibration, Active Vibration Control, Active Force Control, Piezoelectric Sensor and Actuator, Structural Dynamic Modification, System Dynamic Modelling and Simulation". C

[13] The second expert was Dr Muhammad Najib bin Abdul Hamid (SP2), a senior lecturer/programme coordinator at Universiti Kuala Lumpur Malaysian Spanish Institute (UniKL) who specialises in the field of "Vibration and noise, Finite Element Analysis, Vibration Energy Harvesting, Automotive Braking System, Machine Condition Monitoring". D

[14] Their qualifications and expertise in their respective fields were not challenged by the defendants. E

[15] From the tests carried out by SP1 and his team on the vehicle, they found that the vibrations in the vehicle were at least 2.25 to 3.56 times higher than the readings produced by the second defendant. The comparison of vibration tests carried out by SP2 and his team confirmed that the vehicle indeed have excessive vibrations that would affect the comfort of the driver and the front passenger. F

[16] Based on the findings of the experts that there is excessive vibrations in the vehicle that would affect the comfort of the driver and the front passenger which the defendants could not rectify, the defendants had breached their duty to make accurate and true representations (that the vehicle provides a smooth, comfortable and luxurious ride to both driver and passengers) resulting in loss, pain and discomfort to the plaintiffs. G

[17] Wherefore, the plaintiffs had filed the suit against the defendants seeking general and aggravated damages, interest and costs. Prior to the trial, the plaintiffs had withdrawn the suit against the third defendant. H

The Case For The Defendants (Appellants)

[18] The second defendant had inspected the vehicle and found the first plaintiff's complaints to be baseless because no abnormality was detected in the vehicle and it was operating normally. I

[19] The first and second defendants did not make any false or confusing representations to the plaintiffs.

[20] The plaintiffs were not induced by any alleged representation in buying the vehicle.

[21] Therefore, the plaintiffs did not suffer any loss and were not entitled to any of the reliefs sought against the first and second defendants.

Proceedings At The High Court

[22] Other than SP1 and SP2, the plaintiffs had called Allan Chong (SP3), the first plaintiff, to testify. SP1 and SP2, as earlier mentioned, were the expert witnesses. The second plaintiff (who is the registered owner of the vehicle), did not testify and did not attend the trial at all.

[23] The first defendant called its general manager, Shantini Shanmugam (DW1) as its witness. Whereas, the second defendant had called its senior technical consultant, Khoo Eng Hwa (DW2), as a witness.

Decision Of The High Court

[24] The learned High Court Judge found that:

(i) the vehicle suffered from abnormal and excessive vibrations and it had a defect which could not be rectified;

(ii) the defendants had made false and inaccurate representations to the plaintiffs that the vehicle provides a smooth, comfortable and luxurious ride to both driver and passengers;

(iii) the plaintiffs were induced by those false and inaccurate representations to purchase the vehicle;

(iv) the defendants had therefore breached their statutory duty not to make false and confusing representations; and

(v) the plaintiffs had suffered discomfort and loss.

[25] Based on the findings above, the learned High Court Judge on 6 September 2019, held the defendants liable and entered judgment for the plaintiffs for general damages against the defendants. The defendants have filed the present appeal against the decision on liability.

[26] The learned High Court Judge also directed parties to file further written submissions on the issue of quantum of general damages and costs. Upon further written submissions, the learned judge on 10 January 2020, awarded general damages of RM100,000 and costs of RM30,0000 to the plaintiffs. We were given to understand that the decision on quantum, given separately from the judgment on liability, is the subject matter of a separate appeal.

The Grounds Of Appeal

[27] In this appeal, the defendants contended that the learned High Court Judge had:

(i) erred in her findings that the second plaintiff's vehicle suffered from abnormal and excessive vibrations and that the vehicle had a defect which could not be rectified when the defendants had established through the plaintiffs' own expert witnesses that the vibration levels in the vehicle were within the comfortable range;

(ii) erred and misdirected herself in law in deciding that the evidence of an expert could only be challenged and rebutted by the evidence of another expert and therefore the defendants had to adduce evidence from their own expert to challenge and rebut the evidence of the plaintiffs' experts;

(iii) erred in her finding that there were false and inaccurate representations by the defendants which had induced the plaintiffs to purchase the vehicle; and

(iv) erred in allowing the claim by the second plaintiff when the latter never attended the trial and did not lead any evidence whatsoever.

Principles Of Appellate Intervention

[28] Foremost on our minds are the two tests, namely, "plainly wrong" test and "insufficient judicial appreciation of evidence" test for appellate interference in a subordinate court's finding. In respect of the two tests, the Court of Appeal held as follows in *Lee Ing Chin Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 at pp. 98 to 99:

> (2) Generally, an appellate court will not intervene unless the trial court was shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. Judicial appreciation of evidence meant that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. Where contemporaneous documents existed, he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against these. He must also test the evidence of a witness against the probabilities of the case. The principle central to appellate interference is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal.

[29] The Court of Appeal has reiterated in *Ong Leong Chiou & Anor v. Keller (M) Sdn Bhd & Ors And Another Appeal* [2019] 1 LNS 26; [2019] 3 MLRA 322 at p. 329 that:

> [25] We are mindful of the limited role of the appellate court in relation to the findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanour and credibility of the witness before him or her. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is plainly wrong. It would not be sufficient to warrant an appellate interference merely because the appellate court entertains doubt whether such finding is right (See: *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 1 MLRA 95. *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 2 MLRA 1).

[30] In *Mohamed Abdullah v. Chah Hea Seng* [1980] 1 LNS 48, the Federal Court held:

> The decision of the learned Judge was clearly not a specific finding of fact but a finding of facts which are really inferences drawn from facts specifically found, and on the principles enunciated in *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370, we feel more at liberty to form an independent opinion on the conclusion which should reasonably be drawn.

Our Decision

Whether The Vehicle Suffered From Abnormal And Excessive Vibrations And That It Had A Defect That Could Not Be Rectified

[31] The findings of the learned High Court Judge on this issue are found in the following paragraphs of the grounds of judgment ("GOJ"):

> 84. Mahkamah selanjutnya dapati berdasarkan kepada laporan pakar Plaintif-Plaintif, atas imbangan kebarangkalian Mahkamah dapati gegaran yang didapati pada kereta tersebut adalah tidak normal dan melampau.
>
> ...
>
> 93. Mahkamah ini telah dapati bahawa kereta tersebut telah alami gegaran yang melampau di mana Defendan-Defendan telah membuat representasi dan dorongan yang tidak tepat dan tidak benar bila iklan Defendan-Defendan menyatakan kereta tersebut memberi pemanduan yang lancar dan keselesaan yang terunggul semasa memandu dan kereta Lexus NX adalah mewah dimana pemandu dan penumpangnya adalah dijamin suatu tunggangan yang selesa.
>
> 94. Defendan Pertama telah membekalkan kereta tersebut kepada Plaintif-Plaintif yang mempunyai kecacatan yang tidak dapat diatasi serta tidak selesa untuk dipandu atau ditunggang.

[32] The defendants submitted that the learned High Court Judge's findings above are against the weight of the evidence and in particular, against the evidence of the plaintiffs' own expert witnesses.

[33] In response, the plaintiffs said that the issue of vibrations is a technical issue which necessitates evidence from experts to assist the trial judge in coming to a decision (see *Syed Abu Bakar Ahmad v. PP* [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368; [1984] 2 MLJ 19). The plaintiffs had produced not one, but two expert reports on the issue of vibration. The qualification and expertise of the experts was not challenged by the defendants. Notwithstanding the failure by the defendants to call their experts to challenge the expert evidence of the plaintiffs, the learned trial judge had nonetheless, duly considered the issues levelled against the plaintiffs' expert witnesses under cross-examination.

[34] This is evident, learned counsel for the plaintiffs said, from paras. 61 to 79 of the GOJ. I reproduce the relevant paragraphs below:

> 61. Saya telah meneliti laporan pakar dari SP1 dan juga keseluruhan keterangan beliau di dalam Mahkamah, saya dapati isu yang dibangkitkan oleh Defendan-Defendan itu ada dinyatakan dengan jelas di dalam keterangan SP1 di dalam Mahkamah.
>
> ...
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> 72. Di dalam ujian gegaran dari SP1 ini, beliau telah juga menggunakan kenderaan yang berlainan iaitu Hilux untuk membuat perbandingan. Kereta Hilux digunakan untuk perbandingan kerana kereta ini kebiasaannya digunakan untuk aktiviti-aktiviti lasak. Atas isu ini, SP1 telah menyatakan di dalam testimoninya yang tidak dapat disangkal oleh Defendan-Defendan seperti berikut:
>
> S: Atas dasar sedemikian, mengapa anda memilih data Hilux untuk membuat perbandingan? Boleh terangkan.
>
> J: Okay. Untuk bidang getaran tanpa mengira bagaimana jenis kenderaan tersebut. Fokus utama kepada pemandu ialah dapat memberikan getaran yang minimum supaya tidak berlakunya sebarang isu berkaitan getaran terhadap pemandu. Jadi untuk perkara ini, saya boleh memilih mana-mana kenderaan walaupun berbeza dari jenis design untuk melakukan perbandingan getaran tersebut. Walaupun kereta Hilux direka untuk aktiviti yang lebih lasak ketika pemanduan dan kenderaan Lexus NX200T, yang direka untuk keselesaan pemanduan, data menunjukkan bahawa getaran yang dialami oleh Lexus NX200T milik En. Allan lebih tinggi daripada kenderaan yang direka untuk aktiviti lasak. Ini menunjukkan bahawa sesuatu perbandingan yang dilakukan itu adalah lebih praktikal untuk dibandingkan. Kerana kedua-dua kenderaan direka untuk tujuan yang berbeza. This is just a worst case scenario comparison.

73. Ini jelas menunjukkan keupayaan dan tahap getaran yang tinggi telah dialami oleh Plaintif Pertama semasa memandu kereta tersebut.

...

75. Seterusnya, peguam Defendan-Defendan menghujahkan bahawa SP1 dan SP2 telah salah untuk menggunapakai tanpa syarat skala dalam standard ISO pada muka surat 188, Ikatan C adalah konklusif bagi tahap gegaran bagi kenderaan persendirian.

76. Peguam Defendan-Defendan menghujahkan kepada kertas kerja yang dibuat oleh SP2 (muka surat 196-211, Ikatan C - P14) telah menyatakan seperti berikut pada muka surat 196:

> 1. INTRODUCTION
>
> Experiencing the vibration in vehicle is a normal phenomenon to the drivers and the passengers in the vehicle for their short or long hour journey towards their destination. The feeling of vibrating transmitted is very subjective and difficult to describe. Somehow drivers or even passengers tend to give different perception towards the vibration that occurred in their daily driving activity. Somes (*sic*) don't even cara (*sic*) about it ...

77. SP2, semasa keterangannya menyatakan seperti berikut:

S: ... Okay so berdasarkan kepada dua petikan ini. Dr. setuju tak bahawa vibration itu adalah sesuatu yang subjektif mengikut seseorang?

J: Ya betul.

S: Betul ya. Dan Vibration adalah sebenarnya persepsi pemandu itu sendiri. Setuju?

J: Persepsi, ya betul.

78. Peguam Defendan-Defendan berhujah dengan keterangan-keterangan di atas, kereta tersebut berada di dalam keadaan baik dan normal. Walau bagaimanapun, Mahkamah ini dapati bahawa di dalam pemeriksaan semula dalam keterangan SP2 beliau telah menjelaskan mengenai dengan standard ISO ini seperti berikut:

S: Sekarang saya nak rujuk Dr. Najib kepada muka surat 188 ya, ikatan C. Di mana anda telah setuju bahawa di dalam jadual atau bacaan ini, adalah garis panduan bagi pengangkutan awam ya. Boleh jelaskan mengapa walaupun ianya adalah garis panduan pengangkutan awam, anda juga menggunapakai garis panduan ini untuk ujian di kenderaan PMM 6611.

J: Okay berdasarkan muka surat 188, Bahagian C 2.3, so di ...

S: Perlahan sikit boleh?

J: Muka surat 188, Bahagian C 2.3. So, guideline yang disediakan adalah untuk public transport, so saya memilih menggunakan standard ini kerana standard ini menghampiri kepada kes yang sedang dikaji iaitu personal vehicle. So dua-dua adalah transportation ataupun kenderaan yang digunakan. Cuma dalam pengetahuan saya, saya tidak menjumpai standard yang khusus kepada personal car. So that's why we refer to ISO 2631 yang relate to the public transport.

J: So dalam muka surat 200, tidak digunakan term abnormal, tidak digunakan term abnormal tapi as we refer to ISO standard, so ISO standard dia tak categorizekan as a normal, abnormal dan sebagainya. So daripada situ, S3 dan S4 dia fall into the condition of uncomfortable condition dalam julat yang rendah. When compared to the guideline ISO, dia ada sehingga 0.2G. So that's why dia comparable considerably low bila compared to the maximum limit 0.2G. **Tapi value tersebut dia fall into the kategori sedikit tidak selesa.**

79. Jadi, dari keterangan-keterangan ini, gegaran daripada kereta tersebut telah dijelaskan oleh SP2 bahawa gegaran pada kereta ini telah termasuk dalam kategori tidak normal mengikut standard ISO. Keterangan saksi pakar Plaintif-Plaintif ini walau bagaimanapun tidak dapat dicabar oleh keterangan pakar dari Defendan-Defendan.

(emphasis added)

[35] The learned trial judge, counsel submitted, had rightly concluded that in the absence of any expert evidence put forth by the defendants, it follows that the evidence of SP1 and SP2 along with their respective expert reports P4, P5, P9, P10, P11 and P12 stand as evidence on the true level of vibrations in the vehicle.

[36] With respect, the flaw in the above arguments of learned counsel for the plaintiffs is in not appreciating that the ultimate findings of the learned trial judge in paras. 84, 93 and 94 that the plaintiffs, through their expert witnesses, had proven on balance of probabilities that the vehicle suffered from abnormal and excessive vibrations, is plainly wrong in that it is in fact against the totality of the weight of the evidence of the two experts.

[37] It is not in dispute that the testing carried out by SP1 and SP2 on the vehicle involved the placement of accelerometers inside the cabin and on the undercarriage of the vehicle, to measure and record the vibration levels felt inside and outside the vehicle. The first plaintiff's complaint, it must be emphasised, was of the excessive vibrations felt by him inside the cabin at the driver's seat when he drove the vehicle.

[38] Yet we see the plaintiffs' own experts confirming under cross-examination that the results of their tests showed the vibration levels detected on the vehicle to be within the comfortable range. In fact, their finding was that the vehicle had shown better readings and results compared to the comparison vehicles.

[39] With regard to this, learned counsel for the defendants have drawn our attention to the evidence elicited from SP1 and SP2 under cross-examination set out below.

Evidence From SP1

[40] Contrary to the finding by the learned trial judge, SP1's report, which is tendered as "P4", does not conclude that there is any defect in the vehicle which causes excessive vibration. In the conclusion to his report, SP1 confirms that the floor structure design of the vehicle is good and does not contribute to vibrations in the vehicle. His report then concludes that the vehicle is comfortable. These conclusions made by SP1 are evident from the testimony (reproduced below) of SP1 brought out during cross-examination.

Enclosure 3 p. 32 line 2 to p. 33 line 9:

JS: ... Okay pertama sekali daripada rumusan ini, Dr. telah mendapati bahawa, *design struktur lantai kenderaan tersebut adalah bagus. Betul?*

AZ: *Jika mengikut data saya adalah bagus.*

JS: ... Now saya beralih kepada rumusan yang kedua pulak, Dr. kata "From the Spectral analysis ... worst signal came from position number 2 under the floor front right". Okay. So ini position no 2 ini tadi kami telah establish adalah di luar kenderaan di sebelah under carriage. Betul?

AZ: Ya.

JS: Okay. Now dengan mengatakan bahawa the worst signal came from position 2. Setuju tak apa yang Dr. maksudkan adalah bahawa ini adalah signal yang paling tinggi diperolehi.

AZ: Ya.

JS: Setuju ya. Now di dalam keterangan Dr., keterangan saksi ya, saya telah rujuk tadi kepada soalan dan jawapan Dr. no. 19. Dr. kata getaran yang paling ketara adalah di kedudukan kedua yang menunjukkan yang mencecah sehingga 0.029G. Betul?

AZ: Ya.

JS: *Okay. Now Dr. setuju tak 0.029G. bacaan yang paling tinggi diperolehi kalau dikaitkan dengan ISO standard, ya, ISO standard yang Dr. sendiri ada rujuk dalam laporan 2. Ini adalah dalam range, range comfortable. Betul?*

AZ: *Ya comfortable.*

JS: Ulang ...

AZ: *Ya dalam range comfortable, ya.* (emphasis added)

[41] We agree with learned counsel for the defendants that to all intents and purposes, SP1's test and expert report (P4) established beyond doubt that even the highest vibration level recorded (0.029G) still puts the vehicle in the range and classification of comfortable. This puts paid, in our view, to any allegation by the plaintiffs that the vehicle was experiencing excessive vibrations or that it was uncomfortable.

Evidence From SP2

[42] The English version of the report by SP2 on the test he conducted and findings in respect of the vehicle is marked as exh. "P9". In addition, SP2 produced three other reports on the tests done to three comparison vehicles of different models, namely, a Toyota Camry car, a Toyota Hilux pickup and a Lexus NX 200T Luxury variant. These comparison reports are marked as exhs. "P10", "P11" and "P12" respectively.

[43] We agree with learned counsel for the defendants, that likewise, SP2's reports, to all intents and purposes, show beyond a doubt that the vehicle is in fact comfortable. This is because, under cross-examination, SP2 admitted that in respect of the test carried out on the vehicle, as the speed increased, the vibration levels inside the cabin dropped. In some instances it dropped by 50%. For instance, at 60km/h the level of vibration detected by PW2 was 0.01G which was 50% lower than the 0.02G detected at 40km/h. Similarly, at 80km/h the level of vibration detected by PW2 inside the vehicle was 0.005G which was 50% lower than the 0.01G detected at 60km/h.

[44] We reiterate that the first plaintiff's complaint was of the excessive vibration felt inside the vehicle. However, it is the evidence of PW2 that as the speed increased all the way up to 100km/h, the vibration levels detected inside the cabin of the vehicle decreased.

[45] SP2's evidence under cross-examination on the foregoing matters is reproduced below:

Enclosure 4 page 26 line 34 to page 27 line 9:

JS: *So Dr. setuju tak bahawa dalam kenderaan plaintif, okay, bahagian dalam kabin kenderaan plaintif. Apabila kelajuan bertambah, bacaan yang diperolehi menurun walaupun kelajuan meningkat sehingga ke tahap 100 km sejam. Betul?*

NA: *Ya betul.*

JS: *Betul ya. Dan begitu juga dengan bacaan dalam kabin di dalam posisi accelerometer no. 2. Betul?*

NA: *Ya betul.* (emphasis added)

[46] In addition, it was established through PW2 that as far as the position at the driver's seat in the vehicle is concerned, the level of vibration detected at 100km/h was less than that at the static or idle position.

Enclosure 4 page 28 lines 22 to line 30:

JS: *Ya so tapi Dr. setuju tak bahawa pada keadaan static, bacaannya adalah lebih tinggi daripada bacaan yang diperolehi pada masa kenderaan plaintif dibawa pada kelajuan 100 km sejam. Betul?*

NA: *Ya pada point 1 ya betul.*

JS: *Okay. Dan point 1 tadi adalah di bawah di seat pemandu. Betul?*

NA: *Ya betul.* (emphasis added)

[47] In the end, SP2 admitted that in relation to points 1 and 2 inside the cabin of the vehicle, all of the vibration readings obtained from static position up to 100km/h fell within the comfortable range of the ISO standard. His evidence on this is as follows:

Enclosure 4 page 28 line 32 to page 29 line 7:

JS: Okay. Now tadi, okay, bagi kesemua bacaan berkaitan dengan point 1 dan point 2. Semua bacaan bagi point 1 dan point 2 di mukasurat 127 hingga 133, static 20km, 40km, 60km, 80km, 100km. *Bagi kesemua bacaan-bacaan ini di point 1 dan 2. Bacaan yang diterima adalah dalam lingkungan comfortable mengikut standard ISO 2631. Betul*?

NA: *Betul.*

JS: Betul ya. *So ertinya walaupun kenderaan plaintif dipandu pada kelajuan 100km sejam pun, bacaan getaran yang diterima masih di tahap comfortable mengikut standard ISO yang Dr. rujuk. Betul?*

NA: *Ya betul untuk point 1 dan 2.* (emphasis added)

[48] Crucially, it was also established through SP2 that in the case of the three comparison vehicles tested by him including the Lexus NX200T Luxury variant, when the test speed increased, the vibration levels also increased.

Enclosure 4 page 31 line 16 to line 21:

JS: *... So berbanding denqan kereta plaintif yang mana semakin bertambah kelajuan, semakin kurangnya bacaan getaran, kereta perbandingan ini adalah opposite, bertentangan. Semakin bertambahnya kelajuan, bertambahnya bacaan getaran pada point 1 dan 2. Betul?*

NS: *Ya betul.* (emphasis added)

Enclosure 4 page 33 line 27 to page 34 line 4:

JS: Yang di mana kereta plaintif hanya mencapai bacaan getaran tertinggi pada 100km sejam. So ertinya, kenderaan perbandingan Hilux dan Toyota Luxury telah mencapai bacaan tertinggi pada kelajuan yang lebih rendah berbanding dengan kereta plaintif. Betul?

NA: Ya betul.

[49] In addition, SP2 admitted under cross-examination that in his study paper on the vehicle (exh. "P14"), he did not describe the vehicle as "abnormal". In fact, in that study he concluded that the vehicle experienced low vibration levels. He stated (at p. 50 of P14):

> ... The S1 and S2 accelerometer that **were mounted on the seat base showed a very less contribution** to the uncomfortable condition as shown in Figure 11. However, S3 and S4 that were mounted underneath the floor panel showed a significant contribution to the uncomfortable condition. Nevertheless, **the value of the exposure is considerable low when compared to the guideline provided in ISO 2631.**
>
> (emphasis added)

[50] As earlier seen, the learned High Court Judge in para. 78 of the GOJ had referred to the evidence of SP2 during his re-examination that: "... So dalam ms. 200, tidak digunakan term abnormal, tidak digunakan term abnormal tapi as we refer to ISO standard, so ISO standard dia tak categorisekan as a normal, abnormal dan sebagainya. So daripada situ, S3 dan S4 dia fall into the condition of uncomfortable condition dalam julat yang rendah. When compared to the guideline ISO, dia ada sehingga 0.2G. So that's why dia comparable considerably low bila compared to the maximum limit 0.2G. Tapi value tersebut dia fall into the kategori sedikit tidak selesa".

[51] Clearly what was said by SP2 in re-examination is that in his study paper he did not describe the vehicle as "abnormal" because he had used the ISO 2631 (standard) which does not use the terms "normal" or "abnormal". Yet we see in para. 79 of the GOJ the learned trial judge concluding that: "Jadi, dari keterangan-keterangan ini, gegaran daripada kereta tersebut telah dijelaskan oleh SP2 bahawa gegaran pada kereta ini telah termasuk dalam kategori tidak normal mengikut standard ISO". We respectfully say that this is a complete misapprehension of the evidence of SP2 resulting in a finding of fact that "the vibrations in the vehicle are in the category of 'not normal' according to the ISO standard", which is an inference of fact which is plainly wrong.

[52] On the principles enunciated in *Mohamed Abdullah* (*supra*) we are at liberty to form a different opinion on the conclusions that can be drawn from the evidence of SP2 as highlighted above (including his evidence as highlighted by the learned trial judge in paras. 78 and 79 of the GOJ). In this regard, we agree with learned counsel for the defendants on the conclusions that can be elicited from SP2 which we summarise as follows:

(i) the vibration levels inside the vehicle at all speeds and at all times, were within the comfortable range;

(ii) the vibration levels detected on the vehicle were considerably low when compared to the ISO standard and guidelines;

(iii) based on the tests carried out by SP2 and his team, the vehicle performed better in terms of vibration levels than the three comparison vehicles including the Lexus NX200T Luxury variant;

(iv) SP2's own evidence and testing, proved that the vehicle was comfortable when driven and there was nothing abnormal about it in terms of the levels of vibration; and

(v) neither SP1 nor SP2 had said that the vehicle had a defect let alone a defect which could not be rectified.

[53] With due respect, given the above, we are of the view that the findings by the learned High Court Judge that based on SP1 and SP2's reports and evidence in court, the vehicle suffered from abnormal and excessive vibrations and had a defect which could not be rectified, are clearly erroneous. These findings are against the weight of the evidence of SP1 and SP2 and are not supported by their reports and their oral testimonies highlighted above. To the contrary, the defendants, to our minds, had established beyond doubt through the oral and documentary evidence of both the experts called by the plaintiffs, that there was no excessive vibrations in the vehicle. Moreover, even based on the ISO standard, the vibration levels in the vehicle fell within the comfortable range.

[54] In the circumstances, having regard to the fact that the learned trial judge had failed to take into account or give proper weight to and draw proper inferences from SP1 and SP2's evidence to which we have adverted and which might have caused her to come to a different conclusion, we are satisfied that she had not taken proper advantage of her having seen and heard the witnesses. This issue is thus within the range of cases where we are at liberty to act on our own view of the evidence.

[55] Consequently, the plaintiffs had failed to prove there was abnormal and excessive vibrations felt inside the vehicle when driven as alleged by the first plaintiff. *Ergo*, there was no question of the defendants having breached their duty to make accurate and true representations (that the vehicle provides a smooth, comfortable and luxurious ride to both driver and passengers) resulting in loss, pain and discomfort to the respondents. The finding of the learned trial judge to the contrary being plainly wrong, it may be set aside.

Whether The Learned Trial Judge Had Erred And Misdirected Herself In Law In Deciding That The Evidence Of An Expert Could Only Be Challenged And Rebutted By The Evidence Of Another Expert

[56] Given the clear evidence of SP1 and SP2 that the vibration levels of the vehicle were within the comfortable range and in fact better than those found on the three comparison vehicles, it is inexplicable, said learned counsel for the defendants, that the learned trial judge had still gone on to make the finding that the vehicle suffered from abnormal and excessive vibrations and had a defect which could not be rectified.

[57] We agree with learned counsel that the answer to that question lies in the fact that the learned trial judge had misdirected herself in law when dealing with expert evidence. The learned trial judge, we respectfully say, adopted an over-simplified approach and held that an expert witness' evidence could only be challenged and rebutted by the evidence of another expert. Therefore, the defendants had to adduce their own expert evidence to challenge and rebut the evidence of the plaintiffs' experts.

[58] The learned judge puts it this way:

> 52. SP1 telah kemukakan laporan pakarnya dan ditandakan sebagai P4. Manakala SP2 telah kemukakan laporan pakar beliau dan ditandakan sebagai P12. Pihak Defendan-Defendan tidak kemukakan sebarang laporan pakar Defendan-Defendan untuk menyangkal laporan pakar dari Plaintif-Plaintif ini.
>
> 53. Defendan-Defendan memanggil dua orang saksi iaitu SD1 sebagai Pengurus Besar dari Defendan Pertama dan SD2 sebagai Perunding Teknikal Kanan dan Defendan Kedua. Tidak ada keterangan pakar dikemukakan oleh Defendan-Defendan.
>
> ...
>
> 79. Keterangan saksi pakar Plaintif-Plaintif ini walau bagaimanapun tidak dapat dicabar oleh keterangan saksi pakar dari Defendan-Defendan.

[59] In support, the learned judge cited *Jaya Asahak v. Munggau Lawai & Ors (No 2)* [2010] 1 LNS 886; [2010] 6 MLJ 224, which held that:

> (1) Expert evidence can only be challenged by another expert, and in the present case the evidence tendered by the plaintiff's expert by way of the survey report on the location of the disputed cave remained unchallenged and supported plaintiff's claim.

[60] No doubt, the learned judge had been persuaded by the contentions of learned counsel for the plaintiffs who had submitted that the issue of excessive vibrations in the vehicle being highly technical in nature, technical explanations and expert evidence was required. The plaintiffs had produced two expert witnesses and their reports. Although fully aware of the plaintiffs' expert reports, the defendants did not produce their own in rebuttal. Learned counsel then went on to submit (*albeit*, erroneously, as determined earlier) that the expert evidence of SP1 and SP2 that the vehicle suffered from excessive vibrations, stand.

[61] With due respect, we are unable to agree with the learned judge that the evidence of an expert could only be challenged by the evidence of another expert. This is a finding that is erroneous in law and amounts to a serious misdirection.

[62] This issue was considered in *Lee Ing Chin* (*supra*) and this is what Gopal Sri Ram JCA (as he then was) said at p. 57 (CLJ); p. 137 (MLJ) of the report:

> The issue is whether the learned judge was correct in holding that 'a good way of countering the evidence from these expert witnesses is to bring another expert witness who is able to give an opposing opinion'. In our judgment, the foregoing comment of the learned judicial commissioner when read in the context of the rest of his judgment as a whole leads us to the inescapable conclusion that the learned judicial commissioner was only prepared to displace in his judicial mind the evidence of one set of experts with another. We are respectfully of the view that the trial court fell into serious error when adopting what we regard as an over-simplified approach to the evaluation of the totality of the evidence.

[63] We consider it a well-established principle that a defendant is perfectly entitled to challenge the evidence of the plaintiff's expert witness by way of cross-examination without him having to call his own experts. In *Keruntum Sdn Bhd v. The Director Of Forests & Ors* [2017] 4 CLJ 676 at p. 698, Hasan Lah FCJ (speaking for the Federal Court) said:

> [78] It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies, has discharged it, then the evidential burden shifts to the other party ... When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of these different methods. See *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147; [1998] 1 MLJ 697.

[64] On the strength of the foregoing authorities, it is permissible in law for one party to rebut its adversary's case by cross-examining the latter's own witnesses including his expert witness. Thus, the defendants in our present case were perfectly entitled to challenge the evidence of the plaintiffs' experts, SP1 and SP2, by way of cross-examination without them having to call their own experts.

[65] We find that the learned trial judge had failed to appreciate that through the cross-examination of the plaintiffs' own expert witnesses (SP1 and SP2), the defendants had been able to get them to admit and confirm that the vehicle did not suffer from abnormal or excessive vibrations as the first plaintiff had alleged and that in fact the vibration levels in the said vehicle were within the comfortable range.

[66] Moreover, at the close of the plaintiffs' case itself, through the cross-examination of the plaintiffs' expert witnesses (SP1 and SP2), the defendants had not only rebutted the plaintiffs' case but they had also established their defence, namely, that the vehicle was not experiencing abnormal or

excessive vibrations. That being so, the question of the defendants having to call their own experts to challenge and rebut the evidence of SP1 and SP2 did not arise at all.

[67] At para. 58 of the GOJ, the learned trial judge said:

> 58. Saya dapati, di dalam tindakan ini, Defendan-Defendan tidak kemukakan apa-apa laporan pakar daripada Defendan-Defendan yang menyatakan kereta tersebut berfungsi dengan normal dan tiada apa-apa kecacatan dikesan.

[68] We agree with the defendants that by so holding, the learned judge failed to appreciate that the burden to prove abnormal and excessive vibrations and defect in the vehicle rested throughout with the plaintiffs. Flowing from her misdirection that one expert's evidence could only be challenged by the evidence of another expert, the learned judge went on to commit the following errors.

[69] The learned judge held that in the absence of expert evidence from the defendants, she accepted the evidence of the plaintiffs' experts. This is clear from para. 83 of the GOJ:

> 83. Atas kegagalan Defendan-Defendan untuk mengemukakan sebarang laporan pakar untuk menyangkal keterangan pakar Plaintif-Plaintif dari SP1 dan SP2 menyebabkan laporan pakar dari SP1 dan SP2 diterima oleh Mahkamah ini.

[70] We respectfully say that it is erroneous for the learned trial judge to accept the reports tendered by SP1 and SP2 merely because the defendants did not produce expert evidence. To our minds, this is an over-simplistic approach. In *Majuikan Sdn Bhd v. Barclays Bank Plc* [2014] 9 CLJ 337, only one handwriting expert was called to give evidence. The Court of Appeal gave guidance on how a trial court ought to deal with such expert evidence with Mohamad Ariff Yusof JCA (as he then was) stating at p. 356 of the report as follows:

> [33] We have reviewed the findings of the learned judge on the expert evidence of DW14, who is a certified document examiner from the Chemistry Department. For a start, since no other handwriting expert was called, the court really had no other basis to reject her evidence outright. ... **In our view, however, the court should also proceed to consider the totality of the expert's evidence by considering the expert's oral testimony as well.**
>
> (emphasis added)

[71] Thus, notwithstanding there was no expert witness called by the defendants, the learned judge was duty-bound to consider the totality of the evidence of SP1 and SP2 including the oral evidence elicited from them under cross-examination. By deciding that the defendants could only

challenge the expert evidence of SP1 and SP2 by calling their own expert, the learned judge had attached no weight to the evidence favourable to the defendants obtained through the cross-examination of the two expert witnesses. We agree with learned counsel for the defendants that this in itself is a grave error resulting in prejudice to the defendants.

[72] The misdirection on the part of the learned judge that the evidence of one expert could only be challenged by the evidence of another expert had resulted in the learned High Court Judge:

(i) failing to properly evaluate the totality of the evidence of SP1 and SP2;

(ii) completely ignoring and shutting out the evidence favourable to the defendants which was elicited from the plaintiffs' expert witnesses SP1 and SP2 under cross-examination;

(iii) failing to evaluate and judicially appreciate the evidence before her and in particular the contents of both the experts' reports and their oral testimonies which were favourable to the defendants; and

(iv) arriving at findings which were against the weight of the evidence elicited from the plaintiffs' own experts under cross-examination.

[73] We respectfully are of the view that due to the misdirection in the treatment and appreciation of expert evidence on the part of the learned judge, she had failed to analyse, consider and judicially appreciate all of the evidence that was placed before her resulting in her arriving at the erroneous finding that the expert evidence of SP1 and SP2 had established that the vehicle suffered from excessive vibrations and was defective. The principle is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal. In *Lee Ing Chin* (*supra*) at p. 37 the Court of Appeal quoted with approval from the decision in *State of Rajasthan v. Hanuman AIR* [2001] SC 282, at p. 284 where the Supreme Court of India held:

> [An] appellate Court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial Court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. **The sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion.** (emphasis added)

[74] Due to the erroneous approach (discussed above) adopted by the learned judge in respect of the expert evidence of SP1 and SP2, the decision of the High Court may be set aside.

Whether The Learned High Court Judge Erred In Her Finding That There Were False And Inaccurate Representations By The Defendants Which Had Induced The Plaintiffs To Purchase The Vehicle

[75] The plaintiffs' allegation of misrepresentation and breach of duty relates to the abnormal and excessive vibrations. Since we have determined that the vehicle did not have abnormal or excessive vibrations and was in fact within the comfortable range as confirmed by the plaintiffs' own expert witnesses that would mean there was no misrepresentation or breach of duty by the defendants as alleged by the plaintiffs.

[76] For completeness, we will nonetheless deal with the issue.

[77] The learned judge's findings of the defendants having made false and inaccurate representations to the plaintiffs which had induced the latter to purchase the vehicle are found in paras. 85 and 86 of the GOJ:

> 85. Dengan itu juga, Mahkamah dapati Defendan-Defendan telah melakukan kemungkiran representasi dan dorongan melalui iklan tersebut yang telah pun diterima oleh Plaintif-Plaintif dan Plaintif-Plaintif telah bertindak di atas iklan-iklan tersebut.
>
> 86. Dengan itu, Defendan-Defendan telah membuat misrepresentasi dan salah dorongan terhadap Plaintif-Plaintif untuk membeli kereta tersebut.

[78] At paras. 40 and 41 of the GOJ, the learned judge lists out the nine specific statements in three exhibits which she says are the representations which had been breached.

> 40. Bahagian-bahagian iklan yang mana Defendan Kedua membuat representasi dan dorongan telah dibuktikan oleh Plaintif-Plaintif melalui P16, P17 dan P18.
>
> 41. Antara iklan-iklan yang diakui oleh Defendan Kedua dan dibuktikan oleh Plaintif-Plaintif adalah:
>
> (a) P6 pada muka surat 136, Ikatan C
>
> bolder look, smoother drive, sharper feel, let the all-new #NX infuse more edge into your urban adventures.
>
> (b) P6 pada muka surat 138, Ikatan C
>
> ... the all-new #NX delivers unrivalled performance, quick acceleration and greater efficiency in one exquisitely smooth drive.
>
> (c) P16 pada muka surat 139, Ikatan C
>
> step into the elegance, with the LEXUS NX exquisite interior for an ultimate drive that you desire.

(d) P16 pada muka surat 141, Ikatan C

this rainy season can easily be conquered with LEXUS AWD on the #LexusNX. It gives you optimum traction and control, ensuring a safe and comfortable drive home.

(e) P16 pada muka surat 142, Ikatan C

Drive home in comfort this weekend with seats designed to hug your body tight and keep you safe in place as the #LexusNX takes on the curves.

It's a synthesis of comfort and luxury for a peaceful family ride home to celebrate Chinese New Year.

(f) P17 pada muka surat 146, Ikatan C

Here's your chance to experience driving exhilaration in style, luxury and comfort with the Lexus ES and NX.

(g) P18 pada muka surat 147, Ikatan C

Enjoy the first-class luxury comfort ...

(h) P18 pada muka surat 149, Ikatan C

Tell us what's the heart of your driving content? Stay in control and style with the Lexus NX, exclusively equipped with Adaptive Variable Suspension (AVS) to deliver thrilling handling, exceptional performance and a ride smooth as it is stylish.

(i) P18 pada muka surat 150, Ikatan C

less friction and vibration ensure a smoother rider even at high speeds.

[79] The plaintiffs contended that the second defendant's advertisements appeared on the first plaintiff's Facebook which claimed that the Lexus NX200T is a vehicle that would ensure for a smooth and comfortable ride. These statements are made in the Facebook advertisements, the Facebook page and website of the second defendant. The defendants, according to learned counsel for the plaintiffs, did not dispute these advertisements and their contents.

[80] The advertisements made out in very clear and unequivocal terms that the Lexus NX200T vehicle is one that will provide all that is claimed and boasted about in the advertisements. In making representations as they did regarding the vehicle, the defendants are duty-bound not only to ensure the accuracy of the representations but also that they are not misleading or untrue.

[81] This duty, learned counsel said, is laid out in s. 10 of the Consumer Protection Act 1999 which reads:

False or misleading representation

10(1) No person shall make a false or misleading representation that:

(a) **The goods are of a particular** kind, **standard, quality, grade,** quantity, composition, style or model;

...

(h) the goods or services have any sponsorship, approval, endorsement, **performance characteristics,** accessories, **uses or benefits;**

[82] Section 18 of the same Act provides that:

Where the **conduct or representation in relation to any goods or services is made or published in an advertisement,** the advertisement shall be deemed to have been made by:

(a) the person who directly or indirectly claims to supply the goods or services;

(b) the person on whose behalf the advertisement is made; or

(c) both of them as the case may require, unless the contrary is proved. (emphasis added)

[83] The plaintiffs referred to *Pendaftar Hakmilik, Pejabat Pendaftaran Wilayah Persekutuan Kuala Lumpur & Anor v. Poh Yang Hong* [2016] 9 CLJ 297 where the Federal Court said:

[37] We would like to state here that a common law duty of care can arise in the performance of a statutory function ... A failure of that duty can give rise to the coexistence of statutory duty and common law duty of care. (See the case of *X (Minors) v. Bedfordshire County Council* [1995] 3 WLR 152).

[84] On the authority of *Poh Yang Hong* (*supra*) and ss. 10 and 18 of the Consumer Protection Act 1999 above, the plaintiffs submitted that the defendants are duty-bound to uphold their representations.

[85] We are satisfied that the learned judge was plainly wrong in her findings and decision on this issue.

[86] The learned judge in her judgment said that the nine specific representations had been proven by the plaintiffs. However, as pointed out by learned counsel for the defendants, those nine specific representations mentioned in para. 41 of the GOJ were never pleaded by the plaintiffs and neither did the first plaintiff refer to them in the course of his evidence at the trial. We take note that learned counsel for the plaintiffs had not refuted that the nine representations were not pleaded or that the first plaintiff never referred to them in his evidence at the trial. That being so, it would appear that the nine specific instances of representations that the learned trial judge had attributed to the second defendant which had purportedly induced the

plaintiffs to buy the vehicle, are not even the representations that the defendants had claimed to have induced them to buy the vehicle. For this reason, the learned trial judge, in our view, was plainly wrong in arriving at her decision that the plaintiffs had succeeded in proving that they had been induced by the nine specific representations to purchase the vehicle.

[87] The learned trial judge in paras. 40 and 41 of the GOJ also stated that the plaintiffs had proved the false and inaccurate representations which had induced the plaintiffs to purchase the vehicle, through exhs. P16, P17 and P18. These exhibits consist of screenshots of posts on the Facebook account of Lexus Malaysia.

[88] With respect, this finding by the learned judge is erroneous because it totally disregards the evidence elicited from the first plaintiff under cross-examination on exhs. P16, P17 and P18.

Screenshots Of Lexus Facebook Postings ("P16", "P17" & "P18")

[89] With regard to the screenshots at encl. 23 pp. 15 to 18 marked as P18, learned counsel for the defendants have brought to our attention that these were all posted and dated after the second plaintiff had already made the booking and paid the deposit for the vehicle on 23 March 2016 (see receipt at encl. 9, p. 60). In fact, for the posts at encl. 23, pp. 16 to 18 included in P18, all of these were posted and dated after the vehicle had been delivered to the plaintiffs on 8 April 2016.

[90] In respect of the above postings, the first plaintiff admitted as follows under cross-examination:

Enclosure 5 page 9 lines 24-28

JS: Alright. So now my question is even if your wife and you did see these postings at page 147-150, it would have been after the order had been placed for the vehicle. Correct?

AC: Correct.

[91] We agree with the defendants that given that these postings marked P18 only came into existence after the placement of the order and payment of deposit for the vehicle and after its delivery, there could be no question of these postings having induced the plaintiffs to purchase the vehicle. By the time they were posted, the second plaintiff had already placed the order, paid the deposit and taken delivery of the vehicle.

[92] As for the screenshots of the posts on Lexus Malaysia's Facebook account at encl. 23, pp. 4 to 12 marked as P16 and screenshots of posts on Lexus Malaysia's Facebook account at encl. 23, pp. 13 to14 marked as P17, learned counsel has drawn to our attention that apart from a general reference to these pages in his witness statement, the first plaintiff never identified which of the statements therein were false or inaccurate and which of those

statements had induced the purchase of the vehicle. Again, there is no answer from learned counsel for the plaintiffs on this. We therefore agree with the defendants that the first defendant's evidence on this was simply lacking in particulars of the alleged false and inaccurate representation.

[93] Likewise, for these screenshots marked as P16 and P17, there is no evidence to prove that the plaintiffs did in fact see these posts prior to placing the order for the vehicle on 23 March 2016. The first plaintiff in fact admitted under cross-examination that he had taken these screenshots marked as P16 and P17 after delivery of the vehicle and upon experiencing the alleged problem with excessive vibration.

[94] First plaintiff's evidence on this is as follows:

Enclosure 5 page 11 lines 8-23:

JS: I suggest to you that these screenshots at pages 134 to 142 *were only taken by you after the delivery of the vehicle on 8th of April 2016 and after when you started experiencing the alleged vibration problem. Do you agree*?

AC: *Agree.*

JS: *So when you had this problem, alleged vibration problem, you went back into the postings and you took these screenshots. Correct*?

AC: *Agree.*

YA: Agree?

JS: Agree.

AC: Agree Yang Arif. (emphasis added)

[95] From the foregoing, it is quite clear that there was no evidence before the learned High Court Judge that the plaintiffs had seen these postings prior to placing of the order for the vehicle or that the order was induced by these postings. We respectfully say that there has been a failure by the learned judge to consider, evaluate and judicially appreciate any of the aforesaid evidence on exhs. P16, P17 and P18 which was obtained from the first plaintiff under cross-examination.

[96] The learned trial judge had also held that the false and inaccurate representations had been made to both plaintiffs and they had been induced thereby. The Court of Appeal in *Yeohata Machineries Sdn Bhd & Anor v. Coil Master Sdn Bhd & Ors* [2016] 2 CLJ 414 held that in order for a false and inaccurate representation to be actionable and sustainable, there are five essential facts which must be satisfied. In the words of Vernon Ong Lam Kiat JCA (as he then was):

A [23] In order to sustain an action for fraudulent misrepresentation, the plaintiffs must establish five essential facts. First, there must be a representation of fact by words or by conduct and mere silence is not enough. Second, the representation must be made with the knowledge that it is false, ie, it must be wilfully false or at least made in the absence of any genuine belief that it is true or reckless (ie, without caring whether
B his representation is true or false (*Derry v. Peek* [1889] 14 App Cas 337). Third, the representation must be made with the intention that it should be acted upon by the claimant, or by a class of persons which will include the claimant, in the manner which resulted in damage to him. **Fourth, it must be proved that the claimant acted upon the false statements.** Lastly, it must be proved that the claimant has sustained damage by so doing (see
C *Bradford Third Equitable Benefit Building Society v. Borders* [1941] 2 All ER 205 at 211, per Viscount Maugham).

[24] *We do not see any evidence to show that the representations, if any, were made to the plaintiffs. … In the circumstances, all the elements necessary to sustain the plaintiffs' claim for breach of duties and fraudulent misrepresentation had not been*
D *established. …* (emphasis added)

[97] It is further explained in *Halsbury's Laws of England* 4th edn, vol 31 at para 1079 that:

… In order to sustain any action or proceeding for misrepresentation **it is necessary for the representee to establish that he was induced by it, not**
E **merely to alter his mind, but to alter his position,** …

And at para. 1080:

… There are various ways in which a representee may act on the faith of a representation so as to alter his position. **He may enter into a contract**
F **with the representor himself, or with a third person** …
(emphasis added)

[98] In the present case, it was only the second plaintiff who had placed the order for the vehicle as evidenced by the tax invoice (at encl. 9 pp. 60-63) and the receipts (at encl. 9 pp. 60-63). Furthermore, the hire purchase
G agreement was entered into by the second plaintiff only and not by the first plaintiff. This is important because as stated in the authorities cited above, in a claim for misrepresentation, it must be proven that the party to whom the misrepresentation had been made had altered his/her position in reliance thereof.

H **[99]** We agree with the defendants that whilst the first plaintiff in the present case claimed to have seen the representations, he did not alter his position in reliance on those representations because he did not place the order or enter into a hire purchase agreement to finance the purchase of the vehicle. The second plaintiff was a claimant and it was incumbent upon her
I to testify under oath and provide evidence that the alleged false and inaccurate representations were also made to her by the defendants and that

she was induced thereby to purchase the vehicle. However, for reasons best known to her (and no explanation was given to the trial court for this), the second plaintiff chose to stay away altogether from the trial.

[100] We also agree with the defendants that the second plaintiff's absence at the trial means there was no evidence that the alleged false and inaccurate representations were made to her by the defendants and that she had acted upon and was induced to alter her position based on those alleged representations, by placing an order with the first defendant for the vehicle and thereafter entering into a hire purchase agreement with Public Bank Berhad in respect of the vehicle.

[101] We could not have agreed more with the submission of the defendants that the end result is that the first plaintiff who allegedly saw the representations did not alter his position whereas the second plaintiff who altered her position did not see the representations. Thus, both plaintiffs did not have a cause of action and they had failed to prove their claim for misrepresentation and breach of duty.

[102] The learned trial judge had gone on to hold that both defendants are liable for the false and inaccurate representations as contained in exhs. P16, P17 and P18. We agree with the defendants that again, this finding is flawed because the plaintiffs' case of misrepresentation against the first defendant is premised on alleged oral representations (which were not proven) and not on the statements contained in exhs. P16, P17 and P18.

[103] To recap, the allegation by the plaintiffs of misrepresentation and breach of duty relates to the abnormal and excessive vibrations. Since it has been shown above that the vehicle did not have abnormal or excessive vibrations and was in fact within the comfortable range as confirmed by the plaintiffs' own experts SP1 and SP2, that would mean, in our view, that there was no misrepresentation or breach of duty by the defendants as alleged by the plaintiffs.

[104] It follows from what we have said above, that we find the learned judge's findings that the defendants had made false and inaccurate representations to the plaintiffs and that the plaintiffs had been induced by those representations to purchase the vehicle, to be erroneous and arrived at without sufficient judicial appreciation of the evidence. Consequently, these findings may be set aside on appeal.

Whether The Learned High Court Judge Erred In Allowing The Claim By The Second Plaintiff When She Never Attended The Trial And Did Not Lead Any Evidence Whatsoever

[105] As stated earlier, this is an issue raised by the defendants on appeal and dealt with in their written submissions. Unfortunately, there is no answer from the plaintiffs on this issue.

[106] The defendants' contention is that by not testifying in person, the second plaintiff as a claimant in this suit had actually elected not to lead evidence for herself and her case. This is fatal for a plaintiff, the defendants argued, because where a plaintiff does not lead evidence, then his/her claim will be unproven and must fail.

[107] We respectfully agree with the contention of the defendants on this. If the claim was genuine and the second plaintiff wanted to pursue it, it was incumbent upon her to come to court to give evidence. The first plaintiff could not testify for her by way of proxy or representation. The second plaintiff's absence from the trial not only resulted in there being no evidence in support of her case but more importantly, the defendants had been deprived of their right to cross-examine her.

[108] By allowing the second plaintiff's claim, the learned judge has allowed her claim without her having to testify and lead evidence and without her having to be subjected to cross-examination. To our minds, this is a serious and grave error of law on the part of the learned judge and it has greatly prejudiced the defendants who have been found liable to a party who did not even bother to appear in court to prove her case.

[109] The defendants next contended that the learned judge had also erred in fact in allowing the second plaintiff's claim. Again, we are in agreement with the defendants on this point. It was the second plaintiff that paid the deposit and entered into the hire-purchase agreement. She is the legal owner, yet there was absolutely no evidence of any complaint from her about abnormal or excessive vibrations inside the vehicle. Not a single letter, email or any other communication where the second plaintiff had complained about the condition of the vehicle or that she was unhappy with it or that she had suffered discomfort from it were adduced.

[110] Moreover, the first plaintiff gave evidence that the hire-purchase loan between the second plaintiff and Public Bank Bhd had been settled in full by the payment of a sum of approximately RM110,000 in January 2019 thereby making the second plaintiff the owner of the vehicle. It is to be noted that this loan was paid off about three months before the trial began in April 2019.

[111] Ironically, instead of rejecting the vehicle which the plaintiffs claimed was defective due to the alleged abnormal and excessive vibrations by terminating the hire-purchase agreement, the plaintiffs had instead affirmed the hire-purchase agreement and completed the purchase of the purported "defective" vehicle.

[112] In re-examination, the first plaintiff could not give any plausible or logical explanation as to why they would complete the hire-purchase agreement in January 2019 with the second plaintiff becoming the owner thereof, if the vehicle was defective from the very first day it was delivered on 8 April 2016.

[113] We agree with learned counsel for the defendants that the fact that the second plaintiff had completed the hire-purchase and became the owner of the vehicle in January 2019, negated the allegations by the plaintiffs that they were induced by false representations to purchase the vehicle and that it was defective due to the excessive vibrations.

[114] In our respectful view, if only the trial judge had sufficiently appreciated that the plaintiffs could not come up with a plausible or reasonable explanation as to why the second plaintiff would have completed the hire-purchase agreement in January 2019 and became the owner of the vehicle despite alleging that it was defective from the very first day it was delivered on 8 April 2016, she would have drawn a reasonable inference that in all probability the allegations by the plaintiffs that they were induced by false representations to purchase the vehicle was not the truth.

[115] We are therefore of the view that the trial judge was plainly wrong in deciding that the second plaintiff had proved her claim on balance of probabilities. Her decision in allowing the second plaintiff's claim therefore warrants appellate intervention.

Conclusion

[116] It follows from what has been said above that the appeal by the defendants ought to be and was allowed by us with costs of RM40,000 to the plaintiffs/respondents subject to allocator. The High Court judgment was accordingly set aside.